# Datuk Hj Ishak bin Ismail v Kenanga Investment Bank Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO S-22NCVC-7 OF 2011
ZABARIAH MOHD YUSOF J
4 MAY 2011

*Civil Procedure — Pleadings — Material facts — Allegation of tort of conspiracy — Failure to plead essential elements of conspiracy — Whether proves fatal to said allegation — Whether bare allegation of conspiracy of defendants was frivolous and vexatious*

*Civil Procedure — Res judicata — Impeaching earlier judgment — Dispute as to undertaking — Contention of 'suppressed evidence' — Dispute addressed and adjudicated by highest court — Whether same arguments untenable on account of res judicata and issue estoppels*

*Civil Procedure — Striking out — Principles governing — Allegation that summary judgment obtained by fraud or deceit — Allegation of 'suppressed evidence' — Whether discovered since judgment complained off entered — Whether claim obviously unsustainable — Rules of the High Court 1980 O 18 r 19(1)*

Proasas Sdn Bhd ('Proasas') and Dynaboost Sdn Bhd ('Dynaboost') opened a corporate/investment trading account and a share margin trading facility with the first defendant. The plaintiff executed a letter of acknowledgement and undertaking ('the undertaking') in favour of the first defendant wherein the plaintiff unconditionally and irrevocably undertook to pay the first defendant all monies which are now or should at any time be owing to the first defendant by Proasas and Dynaboost in consideration of the first defendant agreeing at the plaintiff's request forbearing to sue the said Proasas and Dynaboost. The plaintiff however breached his undertaking to pay the first defendant for the outstanding indebtedness of the said Proasas and Dynaboost. The plaintiff did not dispute the demand made by the first defendant but instead asked for the first defendant's indulgence for an extension of time to pay. Despite the indulgences given by the first defendant, the plaintiff failed to pay the indebtedness. Hence, the first defendant commenced a civil suit in Kuala Lumpur High Court ('suit 1869') against Proasas, Dynaboost and the plaintiff for a certain sum owed to the first defendant. The plaintiff had filed an appearance but as Proasas and Dynaboost had failed to enter their appearances, accordingly, judgment in default was entered against both the companies. The

first defendant's application for leave to enter summary judgment under O 14 of the Rules of the High Court 1980 ('RHC') against the plaintiff was allowed by the senior assistant registrar ('SAR'). The plaintiff's appeal against the decision of the SAR to the judge in chambers was allowed. Despite the appeal to the Court of Appeal against the decision of the judge in chambers, the High Court fixed the trial of the suit 1869. In preparation of the said hearing, a supplementary bundle of documents was served on the plaintiff by the first defendant. Meanwhile, the first defendant's appeal against the judge in chambers' decision was allowed by the Court of Appeal. The plaintiff's application for leave to appeal to the Federal Court against the decision of the Court of Appeal was however, dismissed by the Federal Court. The plaintiff's suit against the defendants was premised on the aforesaid supplementary bundle of documents. The plaintiff alleges inter alia, that the undertaking was obtained from him by deception, fraud and without his free consent. The plaintiff also alleged that the signature of the undertaking 'does not resemble his' and that he 'does not recall having executed the Undertaking' and that he had never met the solicitor who witnessed his signature in the undertaking. The defendants applied to strike out the plaintiff's suit under O 18 r 19(1)(a) or (b) or (c) or (d) of the RHC and/or under the inherent jurisdiction of the court.

**Held**, allowing the defendants' application with costs:

(1) The plaintiff's story of being coerced, influenced or subjected to pressure and undue influence into signing the undertaking lacks credibility because there were occasions that the plaintiff repeatedly sought from the first defendant for indulgence and extension of time to settle the amount outstanding after notice of demand was issued to him premised on the letter of acknowledgement and undertaking. Not once, at that point in time did the plaintiff ever dispute the letters of demand by the first defendant which were sent to him nor did the plaintiff ever raise the issue that the undertaking were not signed by him or that he was coerced or pressured into signing the same. The allegation by the plaintiff against the defendants were nothing but a ploy and a tactical manoeuvre to avoid and delay the execution of the judgment against him which had been pronounced by the highest court in the land (see paras 54 & 58).

(2) The plaintiff denied that he ever signed the undertaking but in the same breath the plaintiff said that he signed under duress and under illegitimate pressure. If what the plaintiff said was true ie, that he never signed the undertaking, then the issue that he signed under duress, illegitimate pressure and coercion should not arise at all. There cannot be two sets of facts. Clearly, the plaintiff was not telling the truth here (see para 61).

(3) The present action was wholly premised on the contention of the 'suppressed evidence' to question the validity of the summary judgment

which was ordered by the Court of Appeal, which had been addressed and adjudicated. These same arguments are untenable on account of res judicata and issue estoppels (see para 62).

(4) The alleged 'suppressed evidence' was not discovered since the judgment complained off was entered. These 'suppressed evidence' was within the knowledge of the plaintiff when the supplementary bundle of documents were served on the plaintiff's solicitors by the first defendant's solicitors. The judgment complained of by the plaintiff was reinstated by the Court of Appeal. The plaintiff failed to prove that the 'suppressed evidence' was discovered after the judgment complained of (see para 87).

(5) The assertion of collateral purpose for which the defendants had in bringing this claim as alleged by the plaintiff was negated by the conduct of the plaintiff himself when he did not dispute the claim by the first defendant which was premised on the unconditional and irrevocable letter of acknowledgment and undertaking to be responsible for the debts of Proasas and Dynaboost. If it was true that the first defendant with the connivance of the second and the third defendants were exerting pressure on the plaintiff surely he would have disputed the claim after receiving the first letter of demand from the first defendant and renounced the undertaking (see paras 93–94).

(6) The plaintiff's failure to plead any agreement or the particulars of the agreement, and further, the failure to plead with clarity of the alleged overt acts of each of the defendants in committing the alleged conspiracy in pursuance of their agreement proved fatal to the said allegation. Therefore, the bare allegation of conspiracy of the three defendants was a frivolous and vexatious one (see paras 105 & 107).

(7) The serious allegations made by the plaintiff against the defendants with regards to fraud, deceit, conspiracy, connivance in the statement of claim as compared to the evidence adduced in court clearly showed that the claim by the plaintiff against the defendants are unsustainable and not likely to succeed. In any event, the plaintiff had already had his day in court where all the issues raised herein had been ventilated and adjudicated to its finality until the Federal Court. To allow this claim would be an abuse of process as the claim was clearly frivolous and vexatious (see paras 110–111).

**[Bahasa Malaysia summary**

Proasas Sdn Bhd ('Proasas') dan Dynaboost Sdn Bhd ('Dynaboost') membuka satu akaun perniagaan korporat/pelaburan dan kemudahan perniagaan margin berkongsi dengan defendan pertama. Plaintif menandatangani surat pengakuan dan akujanji ('akujanji tersebut') memihak kepada defendan pertama di mana plaintif memberikan akujanji tanpa syarat dan tidak boleh batal, untuk membayar defendan pertama kesemua wang yang kini atau pada

bila-bila masa tertunggak kepada defendan pertama oleh Proasas dan Dynaboost sebagai balasan defendan pertama bersetuju dengan permintaan plaintif untuk tidak menyaman Proasas dan Dynaboost. Plaintif walau bagaimanapun memungkiri akujanji untuk membayar defendan pertama bagi hutang yang tertunggak oleh Proasas dan Dynaboost. Plaintif tidak mempertikaikan tuntutan yang dibuat oleh defendan pertama tetapi sebaliknya memohon jasa baik defendan pertama untuk pelanjutan masa untuk membayar. Walaupun permintaan tersebut diberikan oleh defendan pertama, plaintif gagal membayar hutang tersebut. Maka, defendan pertama memulakan guaman sivil di Mahkamah Tinggi Kuala Lumpur ('guaman 1869') terhadap Proasas, Dynaboost dan plaintif bagi jumlah tertentu yang tertunggak kepada defendan pertama. Plaintif memasukkan kehadiran tetapi Proasas dan Dynaboost gagal memasukkan kehadiran mereka, dengan itu, penghakiman ingkar dimasukkan terhadap kedua-dua syarikat tersebut. Permohonan oleh defendan pertama untuk kebenaran memasukkan penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') terhadap plaintif dibenarkan oleh penolong kanan pendaftar ('PKP'). Rayuan plaintif terhadap keputusan PKP kepada hakim dalam kamar dibenarkan. Walaupun dirayu ke Mahkamah Rayuan terhadap keputusan hakim dalam kamar, Mahkamah Tinggi menetapkan perbicaraan guaman 1869. Dalam penyediaan perbicaraan, ikatan dokumen tambahan diserahkan kepada plaintif oleh defendan pertama. Sementara itu, rayuan defendan pertama terhadap keputusan hakim dalam kamar dibenarkan oleh Mahkamah Rayuan. Permohonan kebenaran oleh plaintif untuk merayu ke Mahkamah Persekutuan terhadap keputusan Mahkamah Rayuan, walau bagaimanapun, ditolak oleh Mahkamah Persekutuan. Guaman plaintif di sini terhadap defendan-defendan adalah berasaskan kepada ikatan dokumen tambahan yang tersebut di atas. Plaintif mendakwa, antara lain, bahawa akujanji tersebut diperoleh daripadanya melalui penipuan, fraud dan tanpa persetujuannya. Plaintif juga mendakwa bahawa tandatangan akujanji 'does not resemble his' dan bahawa dia 'does not recall having executed the Undertaking' dan bahawa dia tidak pernah bertemu dengan peguamcara yang menyaksikan tandatangannya dalam akujanji tersebut. Defendan-defendan memohon untuk membatalkan guaman plaintif di bawah A 18 k 19(1)(a) atau (b) atau (c) atau (d) KMT dan/atau di bawah bidang kuasa sedia ada mahkamah.

**Diputuskan**, membenarkan permohonan defendan-defendan dengan kos:

(1) Cerita plaintif bahawa dia dipaksa, dipengaruhi atau diberi tekanan dan pengaruh tak wajar untuk menandatangani akujanji tersebut tidak boleh dipercayai kerana terdapat masa di mana plaintif berkali-kali memohon jasa baik defendan pertama dan lanjutan masa untuk menyelesaikan jumlah tertungak selepas notis tuntutan diberikan kepadanya berasaskan kepada surat pengakuan dan akujanji tersebut. Tidak sekalipun, pada masa itu, plaintif mempertikaikan surat tuntutan oleh defendan pertama

yang dihantar kepadanya atau plaintif membangkitkan isu bahawa akujanji tersebut tidak ditandatanganinya atau bahawa dia dipaksa atau diberikan tekanan untuk menandatanganinya. Dakwaan oleh plaintif di sini terhadap defendan-defendan adalah helah dan tipu muslihat semata-mata untuk mengelakkan dan melambatkan pelaksanaan penghakiman terhadapnya yang telah diberikan oleh mahkamah tertinggi di negara ini (lihat perenggan 54 & 58).

(2) Plaintif menafikan bahawa dia pernah menandatangani akujanji tersebut tetapi pada masa yang sama plaintif menyatakan dia menandatanganinya di bawah paksaan dan tekanan tak sah. Jika apa yang dinyatakan oleh plaintif adalah benar, iaitu dia tidak pernah menandatangani akujanji tersebut, dengan itu isu bahawa dia menandatanganinya di bawah ugutan, tekanan tidak sah dan paksaan tidak patut timbul langsung. Tidak boleh ada dua set fakta. Jelas, plaintif tidak bercakap benar di sini (lihat perenggan 61).

(3) Tindakan ini secara keseluruhannya berasaskan kepada hujahan 'suppressed evidence' untuk mempersoalkan kesahan penghakiman terus yang diperintahkan oleh Mahkamah Rayuan, yang telah dibicarakan dan diputuskan. Hujahan yang sama tidak dapat dipertahankan atas alasan res judicata dan isu estoppel (lihat perenggan 62).

(4) 'Suppressed evidence' yang didakwa tidak ditemui oleh kerana penghakiman yang diadukan telahpun dimasukkan. 'Suppressed evidence' ini adalah dalam rangkuman pengetahuan plaintif apabila ikatan dokumen tambahan diserahkan kepada peguamcara plaintif oleh peguamcara defendan pertama. Penghakiman yang diadukan oleh plaintif dimasukkan semula oleh Mahkamah Rayuan. Plaintif gagal membuktikan bahawa 'suppressed evidence' tersebut ditemui selepas penghakiman tersebut diadukan (lihat perenggan 87).

(5) Hujahan tujuan kolateral yang mana defendan-defendan telah dalam membawa tuntutan seperti yang didakwa oleh plaintif dinafikan oleh tindakan plaintif sendiri apabila dia tidak mempertikaikan tuntutan oleh defendan pertama yang diasaskan atas surat pengakuan dan akujanji tersebut yang tidak bersyarat dan tidak boleh batal untuk bertanggungjawab terhadap hutang-hutang Proasas dan Dynaboost. Jika benar bahawa defendan pertama dengan kerjasama secara diam oleh defendan kedua dan ketiga memberikan tekanan kepada plaintif, sudah tentu dia akan mempertikaikan tuntutan selepas menerima surat tuntutan pertama daripada defendan pertama dan mengakui akujanji tersebut sebagai tidak benar (lihat perenggan 93–94).

(6) Kegagalan plaintif memplid apa-apa perjanjian atau butiran perjanjian, dan selanjutnya kegagalan memplid dengan jelas tindakan terang-terangan yang didakwa terhadap setiap seorang defendan dalam

melakukan konspirasi yang dinyatakan berikutan perjanjian mereka terbukti menjejaskan dakwaan tersebut. Dengan itu, dakwaan konspirasi semata-mata terhadap ketiga-tiga defendan adalah suatu yang remeh dan menyusahkan (lihat perenggan 105 & 107).

(7) Dakwaan serius yang dibuat oleh plaintif terhadap defendan-defendan berkaitan dengan fraud, penipuan, konspirasi, kerjasama secara diam-diam di dalam pernyataan tuntutan berbanding dengan keterangan yang dikemukakan di mahkamah jelas menunjukkan bahawa tuntutan oleh plaintif terhadap defendan-defendan tidak boleh dikekalkan dan tidak mungkin berjaya. Walau bagaimanapun, plaintif telah pergi ke mahkamah di mana kesemua isu yang dibangkitkan di sini telah dikemukakan dan dibicarakan sehingga pemutusan terakhir di Mahkamah Persekutuan. Membenarkan tuntutan ini akan menjadi penyalahgunaan proses kerana tuntutan tersebut jelas remeh dan menyusahkan (lihat perenggan 110–111).]

**Notes**

For a case on principles governing striking out, see 2(3) *Mallal's Digest* (4th Ed 2010 Reissue) para 7550.

For cases on material facts, see 2(3) *Mallal's Digest* (4th Ed 2010 Reissue) paras 6091–6093.

For cases on res judicata in general, see 2(3) *Mallal's Digest* (4th Ed 2010 Reissue) paras 6675–6808.

**Cases referred to**

*Asia Commercial Finance (M) Bhd v Kawal Teilti Sdn Bhd* [1995] 3 MLJ 189, SC (refd)

*Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Berhad* [1993] 3 MLJ 36, SC (refd)

*Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57, CA (refd)

*Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143, FC (refd)

*Lornho Ltd v Shell Petroleum Co Ltd* [1981] 2 All ER 456 (refd)

*Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed* [1998] 2 MLJ 425, CA (refd)

*Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) sdn Bhd) & Ors* [1969] 1 MLJ 309, CA (refd)

*Renault SA v Inokom Corporation Sdn Bhd & Anor & Other Appeals* [2010] 5 MLJ 394

*Seng Huat Hang Sdn Bhd & Ors v Chee Seng & Co Sdn Bhd* [1987] 1 MLJ (refd)

*Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1, PC (refd)

*Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283, CA (refd)

*Yap JH v Tan Sri Loh Boon Siew & Ors* [1991] 3 CLJ 2960, CA (refd)

**Legislation referred to**

Rules of the High Court 1980 O 14 r 2(1), O 18 r 19(1)(a), (b), (c), (d)

*Teh Meng Teck (Dianne Ng, Tan Wei Wei and S Y Fu with him) (Cheah Teh & Su) for the first defendant.*
*Richard WG Lee (Richard Lee) for the second defendant.*
*Saranjit Singh (Nur Faezah Mason with him) (Saranjit Singh) for the plaintiff.*

**Zabariah Mohd Yusof J:**

**[1]** Enclosure 11 is the second defendant's application to strike out the plaintiff's writ and statement of claim under O 18 r 19(1)(a) or (b) or (c) or (d) of the RHC and/or under the inherent jurisdiction of the court.

**[2]** Enclosure 7 is the application by the first defendant to strike out the plaintiff's writ and statement of claim under O 18 r 19(1)(b) or (d) of the Rules of the High Court 1980 and/or under the inherent jurisdiction of the court.

BACKGROUND FACTS

**[3]** Proasas Sdn Bhd ('Proasas') and Dynaboost Sdn Bhd ('Dynaboost') have opened a corporate/investment trading account and a share margin trading facility with the first defendant.

**[4]** There was a letter of acknowledgement and undertaking dated 28 June 1999 ('the undertaking') executed by the plaintiff in favour of the first defendant (refer to LKK5 of encl 8).

**[5]** The terms of the letter of acknowledgement and undertaking is that, the plaintiff, inter alia, *unconditionally and irrevocably* undertook to pay the first defendant on or before 31 December 1999 all monies which are now or should at any time be owing to the first defendant by Proasas and Dynaboost in consideration of the first defendant agreeing at the plaintiff's request forbearing to sue the said Proasas and Dynaboost.

**[6]** Proasas and Dynaboost have suffered substantial losses in the aforesaid accounts.

**[7]** The plaintiff breached his undertaking to pay the first defendant for the outstanding indebtedness of the said Proasas and Dynaboost by 31 December 1999.

**[8]** The first defendant's solicitors demanded payment from the plaintiff vide letter of demand dated 28 January 2000 (exh LKK3 of encl 8).

**[9]** The plaintiff did not dispute the demand made by the first defendant but instead asked for the first defendant's indulgence for an extension of time to pay till the end of July 2000 vide a letter dated 4 February 2000 (exh LKK7 of encl 8).

**[10]** There was a series of letters between the plaintiff and the first defendant from 23 February 2000 until 21 July 2000 which relates to the plaintiff's repeated request for more indulgence and time for him to 'settle the outstanding sum which was due to K&N Kenanga (1st Defendant)'.

**[11]** The plaintiff's letter dated 28 April 2000 to the first defendant, inter alia, states as follows:

> I would like, to request for a further extension of time for another 3 months to settle the outstanding sum which was due to K&N Kenanga.

**[12]** The plaintiff's letter dated 14 July 200, inter alia, states as follows:

> We assure you that the stakeholder has been appointed, we shall give the letter to them to get the amount owing to your client.

(refer to exh LKK8 of encl 8).

**[13]** The plaintiff failed to pay the indebtedness despite the indulgences given by the first defendant.

**[14]** As a result, the first defendant's solicitors then issued another fresh letter of demand dated 5 July 2001 (exh LKK9 of encl 8).

**[15]** Again the plaintiff failed to pay the said indebtedness. It is to be noted that at this point, in time, the plaintiff did not dispute the indebtedness.

**[16]** On 26 October 2001, the first defendant then commenced a suit in Kuala Lumpur High Court Civil Suit No D-22–1869 of 2001 ('Suit 1869') (exh LKK4 of encl 8) against:

(a) Proasas;

(b) Dynaboost; and

(c) the plaintiff,

for a certain amount of sum owed to the first defendant.

**[17]** The claim by the first defendant in Suit 1869 was premised upon the undertaking dated 28 June 1999 executed by the plaintiff in favour of the first defendant (refer to LKK5 of encl 8). A

**[18]** There was no dispute by Proasas and Dynaboost on the alleged debt and judgment in default was accordingly entered against Proasas and Dynaboost on 20 December 2001 and 3 December 2001 respectively when both the companies failed to enter their appearances (exh LKK10 of encl 8). B

**[19]** The plaintiff filed an appearance and the first defendant filed an application for leave to enter summary judgment under O 14 of the Rules of the High Court 1980 against the plaintiff. C

**[20]** In the hearing of the summary judgment, the plaintiff contended, inter alia: D

(a) that there was a purported 'real and economic duress' and 'coercion' by the first defendant;

(b) that the undertaking was 'purely a comfort position and no more that';

(c) 'at first blush the signature on the Alleged Undertaking does not resemble my signature'; E

(d) that the plaintiff 'does not recall having executed the Undertaking';

(e) that the plaintiff 'did not know nor had he ever met the said witness' The said 'witness' is Woo Wei Kwang whose name appears as the advocate and solicitor in Messrs Skrine (the first defendant's previous solicitors). F

(These can be found in the plaintiff's affidavit in reply when the plaintiff contested the application by the first defendant for summary judgment in Suit 1869 — exh LKK12 of encl 8). G

**[21]** After hearing submissions from both parties, on 19 May 2003 the SAR granted the first defendant leave to enter summary judgment against the plaintif. H

**[22]** On 22 May 2003 the plaintiff filed an appeal to the judge in chambers against the SAR's decision dated 19 May 2003.

**[23]** On 15 July 2005 the plaintiff's appeal, to the judge in chambers against the decision of the SAR, was allowed by the judge in chambers. I

**[24]** On 21 July 2005 the first defendant appealed to the Court of Appeal against the decision of the judge in chambers dated 15 July 2005.

**[25]** Despite the appeal by the plaintiff to the Court of Appeal on the decision of the judge in chambers has not been disposed, the High Court fixed the trial of the Suit 1869 on 20 October 2008 to 22 October 2008.

**[26]** However, on 17 October 2008, before the hearing date, the first defendant's solicitors served on the plaintiff's solicitors a supplementary bundle of documents with regard to the Suit 1869 in preparation for the hearing of the Suit 1869. It is this 'Supplementary Bundle of Documents' that the plaintiff referred to as 'the Suppressed Evidence'.

**[27]** However the trial of the Suit 1869 at the High Court did not proceed, as the said judge had other part heard cases to complete. In addition the plaintiff's counsel had informed the High Court judge in the Suit 1869 that the plaintiff will be filing an application for discovery of documents arising from the supplementary bundle of documents which were served on the plaintiff's solicitors on 17 October 2008. As a result the trial dates for Suit 1869 ie 21 October 2008 and 22 October 2008 were vacated.

**[28]** The plaintiff then filed his application for discovery of documents in Suit 1869 on 19 November 2009 ie more than one year after the plaintiff's solicitors informed the High Court. Judge of the same. By this time the second defendant was no longer an executive director of the first defendant.

**[29]** The appeal by the first defendant to the Court of Appeal was fixed for hearing on 7 July 2010. This was informed by the Court of Appeal vide letter dated 25 May 2010 to both the parties.

**[30]** The plaintiff filed a motion for leave to adduce fresh evidence (ie the supplementary bundle of documents) at the Court of Appeal on 21 June 2010, for purposes of hearing of the appeal (on the summary judgment) on the decision by the judge in chambers dated 15 July 2005 (refer to exh LKK19 of encl 8).

**[31]** At the hearing of the motion for leave to adduce fresh evidence at the Court of Appeal, the first defendant objected on the grounds that:

(a) the said supplementary bundle of documents which was sought to be introduced as fresh evidence for the first defendant's said appeal was irrelevant and would not have an important influence in the result of the appeal because the first defendant's cause of action against the plaintiff was premised upon the letter of acknowledgment and undertaking; and

(b) the plaintiff claimed that the documents were crucial and relevant to the hearing

in the said appeal, however the delay by the plaintiff (about 20 months) in filing the application to adduce fresh evidence at the Court of Appeal shows that it is not so.

**[32]** On 7 July 2010, the plaintiff's motion for leave to adduce fresh evidence at the Court of Appeal was dismissed unanimously by the Court of Appeal judges (exh LKK22 of encl 8).

**[33]** Thereafter, the first defendant's appeal against the judge in chambers' decision that set aside the decision of the SAR, was allowed by the Court of Appeal unanimously. The decision of the judge in chambers dated 15 July 2005 was set aside and the decision of the SAR dated 19 May 2003 that allows the first defendant's application for summary judgment against the plaintiff was restored.

**[34]** On 19 July 2010, the plaintiff's solicitors applied to withdraw the plaintiff's application for discovery in Suit 1869 at the High Court. The SAR subsequently struck out the said application by consent.

**[35]** On 2 August 2010 the plaintiff filed a motion for leave to appeal to the Federal Court against the decision of the Court of Appeal in allowing the first defendant's appeal against the judge's in chambers decision dated 15 July 2005 (ie in allowing the first defendant's application to enter summary judgment against the plaintiff).

**[36]** After hearing arguments from both parties the Federal Court unanimously dismissed the plaintiff's motion for leave with costs on 13 October 2010.

**[37]** With the above factual matrix as background, the plaintiff filed his claim against the defendants in the suit herein which is premised on the aforesaid supplementary bundle of documents. The plaintiff alleges fraud, deception, deceit, conspiracy and all wrongdoings purportedly committed by the first defendant and the second defendant.

**[38]** Dato' Ramli, the second defendant was the executive director of the first defendant until 23 August 2009 and thereafter ceased to be a director of the first defendant.

**[39]** Ng Koh Lip, the third defendant was a dealer of the first defendant from 1 June 1991 until 25 February 2003 after which the third defendant ceased to be an employee of the first defendant.

**[40]** The allegation of fraud, deception, deceit, conspiracy and all wrongdoings purportedly committed by the first defendant and the second defendant in particular:

(a) that the first defendant had, with the purported connivance of the Dato' Ramli and the third defendant, allegedly willfully, deliberately, fraudulently and deceitfully *suppressed evidence* from the court to procure summary judgment from the plaintiff in the Suit 1869;

(b) that there was purported fraud and deception upon the court in that there was purportedly willful and meditated contrivance by the first defendant to prevent the disclosure of the so called 'Suppressed Evidence' (ie the supplementary bundle of documents) which the plaintiff claims would have exonerated him or prevented him from placing his case before the High Court and the Court of Appeal;

(c) that it was purportedly an abuse of process to institute the Suit 1869 to obtain the judgment dated 19 May 2003 and to expose the plaintiff to possible insolvency, proceedings and that the Suit 1869 was allegedly brought for a collateral and ulterior purpose to bring improper pressure on the plaintiff to make him answerable for the debts of Proasas and Dynaboost; and

(d) that there has been or continues to be 'a conspiracy and course of conduct orchestrated' by the first defendant with the participation and/or knowledge of Dato' Ramli and the third defendant to cause the plaintiff injury loss and damage.

**[41]** The basis of the first defendant in the striking out application is that:

(a) the suit filed herein by the plaintiff is an attempt to relitigate issues which had been adjudged to its finality until the Federal Court level. The principle of res judicata applies in this instance; and

(b) the plaintiff's attempt *to impeach the judgment dated 19 May 2003 is* frivolous and vexatious and/or an abuse of court's process.

**[42]** The basis of the second defendant in the striking out application is under O 18 r 19(1)(a) ie that the plaintiff *failed to plead material facts necessary to disclose a reasonable cause of action* against the second defendant.

## THE COURTS FINDINGS

*Whether the action herein is caught by res judicata*

**[43]** It is clear that in the Suit 1869, the plaintiff had alleged that the

signature on the undertaking does not resemble his and that there was coercion and duress to make him accept and assume liability of the default of Proasas and Dynaboost.

**[44]** He alleged that the undertaking was executed under duress and that he did not freely consent to the undertaking in view of the purported threats to report him the authorities.

**[45]** The same argument were raised again at the appeal at the Court of Appeal which did not find favour amongst the Court of Appeal judges, who subsequently reinstated the decision of the SAR which granted to the first defendant to enter summary judgment against the plaintiff.

**[46]** What is pertinent is that, here again in the Suit herein, the plaintiff raised once again that the undertaking was procured from him by purported pressure,threat, coercion and duress. It was also alleged that the undertaking was obtained from him by deception, fraud and without his free consent.

**[47]** The long and shot of all is that the plaintiff is singing the same tune as that in Suit of 1869. These issues in the suit herein are the very same issues that have been raised, litigated and adjudged until the highest court of the country in Suit 1869. These issues in the suit herein are the very same issues that have raised, litigated and adjudged until the highest court of country in Suit 1869

**[48]** The plaintiff already had his day from the High Court, Court of Appeal and the Federal Court. To allow the plaintiff to proceed with the suit herein would offend the principle of res judicata. The case of *Asia Commercial Finance (M) Bhd v Kawal Teilti Sdn Bhd* [1995] 3 MLJ 189 is very clear on this, where Peh Swee Chin FCJ explained the principle as follows:

> … when a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as truth: res judicata pro veritate accipitur. The public policy of the law is that, it is in the public interest that there should be finality in litigation-interest rei publicae ut sit finis litium. It is only just that no one ought to ve vexed twice for the same cause of action-nemo debet bis vexari pro eadem causa. Both maxims are the rationales for the doctrine of res judicata, but the earlier maxim has the further elevated status of a question of public policy
>
> … Thus, there are in fact two kinds of estoppel per rem judicatum. The first type relates to cause of action estoppel and the second, to issue estoppel, which is a development from the first type.

> The cause of action estoppel arises when the rights or liabilities involving a particular right to take a particular action in court for a particular remedy are determined in a final judgment and such right of action, ie the cause of action has turned into the said final judgment. The said cause of action may not be relitigated between the same parties because it is res judicata.
>
> In order to prevent multiplicity of action and also in order to protect the underlying rationales or estoppel per rem judicatum and not to act against them, such estoppel or cause of action has been extended to all other causes of action (based on the same facts or issues) which should have been litigated or asserted in the original earlier action resulting in the final judgment, and which were not, either deliberately or due to inadvertence.

**[49]** The first defendant has quoted the case of *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1 which shares similar facts as the facts in our case herein. In *Tractors Malaysia Bhd*, one Tio Chee Hing ('Tio') filed a writ and statement of claim to impeach the judgment which had been entered against him premised upon an agreement which he had executed. The agreement was that Tio undertook to pay the debt of his company, Southern Estates Sdn Bhd. In his statement of claim in the new writ and statement of claim Tio stated that he was illiterate in English and that he was induced to sign the agreement by the fraudulent misrepresentation of Tractor's solicitors who drafted the agreement. Thus, based on these allegations, Tio in the new writ and statement of claim claimed that the earlier judgment entered against him was voidable for fraud.

**[50]** The similarity of the *Tractors Malaysia Bhd*'s case with our present case is that the plaintiff had executed the agreement before a solicitor where he undertook to pay the debts of Proasas and Dynaboost. Judgment was similarly entered against the plaintiff in the Suit 1869 and now the plaintiff is seeking to impeach the earlier judgment in suit 1869 on grounds, inter alia, that the undertaking was obtained by duress, fraud, misrepresentation and coercion.

**[51]** In *Tractors Malaysia Bhd*'s case, Tractors applied to strike out the suit on grounds that it was frivolous and vexatious. The High Court granted Tractor's application and held that Tio's writ and statement of claim was 'brought to defeat the course of justice in the hope of delaying execution' of the judgment of the earlier action. Tio appealed to the Federal Court where he succeeded as the Federal Court was of the view that they were precluded from examining the evidence for the purposes of determining whether the new action was bound to fail. Tractors appealed to the Privy Council which held that:

> In refusing to submit the evidence to critical examination, however, the Federal Court erred in law.

**[52]** The Privy Council had examined the evidence critically and concluded

that Tio could never succeed in the new action. The Privy Council observed that Tio, in his statement of claim did not allege that he continued to be unaware of the true contents of the agreement after the close of the meeting with the lawyer before whom he signed it. Further Tio alleged that he did not understand the terms of the agreement which he executed. After judgment was entered against Tio, Tractors obtained a prohibitory order on Tio's lands. Tio then instructed his solicitor not to oppose Tractor's application. The Privy Council stated:

> In Their Lordships' view it offends credulity that he should have instructed his advocate not to opposethe prohibitory orders if the case he now seeks to make in the New Action had any foundation in fact.

**[53]** The same goes with the plaintiff in our case herein the plaintiff did not allege in his statement of claim nor in his affidavit that he continued to be coerced or subjected to pressure and undue influence after he executed the undertaking.

**[54]** The plaintiff's story of being coerced, influenced or subjected to pressure and undue influence info signing the undertaking lacks credulity because there were (not once) occasions that the plaintiff repeatedly sought from the first defendant for indulgence and extension of time to settle the amount outstanding (refer to his letters dated 4 February 2000, 28 April 2000 and 25 May 2000) after notice of demand was issued to him premised on the letter of acknowledgement and undertaking. Not once, at that point in time did the plaintiff ever disputed the letters of demand by the first defendant which were sent to him nor the plaintiff ever raised the issue that, the undertaking were not signed by him or that he was coerced, pressured into signing the same.

**[55]** What is more interesting is that the plaintiff in order to avoid liability, has alleged in his affidavit of 19 March 2002 that the signature of the undertaking 'does not resemble his' and that he 'does not recall having executed the Undertaking' and that he had never met the solicitor who witnessed his signature in the undertaking.

**[56]** It is to be observed that the plaintiff herein is a corporate figure and was a major shareholder or was a director of numerous public listed companies including Kenmark Industrial Co (M) Bhd, KFC Holdings Bhd, Ayamas Food Corporation Bhd, Idris Hydraulic Bhd, Prime Utilities Bhd, Scientex Industries Bhd, Promet Bhd and Perusahaan Sadur Timur Malaysia (PERSTIMA) Bhd. Therefore, he is no novice in the corporate world and should be fully aware of what he was signing. The story of him being pressured to sign the undertaking lacks credulity. Even if assuming that his story is to be

believed (which is incredible), there was ample opportunity for him to subsequently lodged a police report on the alleged coercion and undue influence which was purportedly exerted against him. However, not only did the plaintiff not lodge a report nor complaint against the said solicitor, he also asked for indulgences from the first defendant to pay the outstanding sum. There was no explanation given by the plaintiff as to why did he ever gave the assurances to the first defendant that he will be paying the demanded sum within a certain date. The act and conduct of the plaintiff here clearly defies logic and common sense from someone who alleged that he had been forced to sign the undertaking.

**[57]** The Privy Council in the *Tractors*'s case held that the new action by Tio 'is nothing but merely a new twist to overcome the respondent's (Tio) difficulty in raising the loan and to delay the execution of judgment against him'.

**[58]** Similarly, the allegation by the plaintiff herein against the defendants are nothing but a ploy and a tactical manouevre to avoid and delay the execution of the judgment against him which had been pronounced by the highest court in the land. He is certainly grasping at straws to avoid payment to the first defendant.

**[59]** On the allegation that the first defendant had suppressed evidence from the Court of Appeal, this argument is without merits and does not make sense. The so called 'Suppressed Evidence' was the bundle of supplementary documents which was served on the plaintiff's solicitors as early as 17 October 2008 before the trial of the hearing of Suit 1869. Further, this 'Suppressed evidence' had been ventilated at the Court of Appeal when the plaintiff filed its notice of motion to adduce fresh evidence in the hearing of the appeal before the Court of Appeal in the Suit 1869. The Court of Appeal judges had heard the submissions of the plaintiff and the first defendant and had dismissed the motion for leave to adduce fresh evidence. Where is the suppression. All (the suppressed evidence) had been brought to the fore before the Court of Appeal judges.

**[60]** Therefore, the argument of 'Suppression of Evidence' by the defendants has no merits at all.

**[61]** It is to be noted that now the plaintiff deny that he ever signed the undertaking but in the same breath the plaintiff said that he signed under duress and under illegitimate pressure. Clearly the plaintiff is blowing hot and cold. If what the plaintiff said is true ie that he never signed the undertaking, then the issue that he signed under duress illegitimate pressure and coercion should not arise at all. There cannot be two sets of facts. Clearly the plaintiff is not telling the truth here.

**[62]** Therefore the present action which is brought before me is wholly premised on the contention of the 'Suppressed Evidence' to question the validity of the summary judgment which was ordered by the Court of Appeal, which had been addressed and adjudicated. These same arguments are untenable on account of res judicata and issue estoppels. These two principles were explained in *Asia Commercial Finance (M) Berhad v Kawal teliti Sdn Bhd* and *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57. The salient features of res judicata and issue estoppels are that res judicata and issue estoppels:

(a) are operative so long as the issues (whether of fact or law or mixed fact and law) in the subsequent action/proceeding is the same, as that which arise or is related to the earlier action/proceeding;

(b) apply even though the subsequent action is couched on a different cause of action from the earlier one;

(c) apply even though the subsequent action is presented in a different way or on a different basis from the earlier one;

(d) apply even though the reliefs sought in the subsequent action are different from the reliefs sought in the earlier one;

(e) apply even though the defendant in the subsequent action/proceedings is not the same defendant in the earlier action/proceeding or even though there are additional defendants in the subsequent action/proceeding compared to the earlier action/proceeding;

(f) even if the defendant in the subsequent action/proceeding is not the same defendant in the earlier action/proceeding, res judicata and issue estoppels can be invoked to defeat the subsequent action/proceeding if there is a privity of interest or common interest between the defendant in the subsequent action/proceeding and the defendant in the earlier action/proceeding;

(g) mean that if the plaintiff could have, but did not claim in the earlier action/proceeding, whatever he is claiming in the subsequent action/proceeding, he would not be allowed to make such claims in the subsequent action/proceedings; and

(h) therefore, the issues or the cause of action which the plaintiff has instituted against the defendants herein are issues which had been addressed and adjudicated in Suit 1869.

**[63]** The privity or common interest between the parties in Suit 1869 and the Dato' Ramli in the Suit herein is evidenced by the following:

(a) although Dato' Ramli and the third defendants were not named in the Suit 1869, it is pleaded in the suit herein that Dato' Ramli and the third

defendants were a director and dealer of the first defendant respectively 'at all material times' and that the fraudulent suppression of evidence in the Suit 1869 was done vide a conspiracy orchestrated by the first defendant involving the Dato' Ramli and the third defendants/the connivance of the Dato' Ramli the third defendants; and

(b) as such Dato' Ramli and the third defendants have an interest in what happened in Suit 1869 ie in the Court of Appeal's decision under Suit 1869 in disallowing the plaintiff's notice of motion to adduce fresh evidence in the form of the so called 'Suppressed Evidence' to oppose the summary judgment proceedings.

**[64]** When the plaintiff's appeal against the SAR's decision in the summary judgment in Suit 1869 was allowed, he could have filed his counterclaim against Dato' Ramli and the third defendant to impugn the undertaking premised on the so called 'Suppressed Evidence' (eg seeking for a declaration that the undertaking was null and void and therefore unenforceable). As such he cannot now be allowed to proceed against Dato' Ramli and the third defendant on the alleged 'Suppressed Evidence' in the suit herein when he could have done so in Suit 1869.

**[65]** Clearly the present suit herein is caught within the principle of res judicata.

IMPEACHMENT OF JUDGMENT

**[66]** The plaintiff in the suit herein is seeking to impeach the judgment which was reinstated by the Court of Appeal.

**[67]** In *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143, Chang Min Tat FCJ held, inter alia, at p 144 that if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment.

**[68]** However before the court can set aside the judgment on grounds of fraud, the court will require a strong case to be established. The burden is on the plaintiff to show that there was fraud. Unless it is shown that the fraud alleges raises a reasonable prospect of success and was discovered after judgment, the action will be stayed or dismissed as vexatious (refer to *Halsbury's Laws of England*, Vol 26, (4th Ed), at p 285).

**[69]** In the case of *Seng Huat Hang Sdn Bhd & Ors v Chee Seng & Co Sdn Bhd*

[1987] 1 MLJ, Edgar Joseph J analysed the English/Commonwealth cases when it comes to the relief of impeachment of court judgment is sought. He said in his judgment that:

> Now 'acts of the highest judicial authority', though 'not to be impeached from within', yet 'are impeachable from without', for 'although it is pot permitted to shew that the court was mistaken, it may be shewn that they were misled …
> On the other hand, in the *Australian case of Price v Stone* [1964] VR 106 Gillard J pointed out the necessity of proving a deliberate fraud upon the Court as a foundation of this relief, and. contrasted this with misleading or erroneous evidence falling short of this requirement.

**[70]** From the aforesaid cases, essentially what must be proven to impeach a judgment of any court is that:

(a) the fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the court in ignorance of the decree by that contrivance, (at p 212); and

(b) the plaintiff must always explain why the matters alleged could not have been brought forward in the original proceedings. In *Birch v Birch* it was held that *there must be a suggestion in the statement of claim, if it is to escape being struck out as being frivolous and vexatious, of such facts, only discovered since the trial*, as if proved, would render it reasonably probable that the judgment would be upset, though the facts suggested need not necessarily be such as would have been evidence at the trial (at p 430).

**[71]** Further question for determination by the court in the case herein is that:

(a) whether there was actual fraud on the part of the first defendant. The plaintiff alleged that there was a meditated and intentional contrivance to keep him and the court in ignorance of the real facts and obtaining the judgment by 'connivance';

(b) whether the matters alleged could not have been brought up in the Court of Appeal before the judgment was ordered to be entered against the plaintiff; and

(c) whether the plaintiff has shown that there, is a reasonable prospect of success and produced evidence of facts since the judgment complained of.

*Whether there was actual fraud*

**[72]** The particulars of fraud as alleged by the plaintiff in the statement of claim at para 17(a) states that:

(i) the 1st Defendant applied undue threat, pressure or coercion or carried out deception;

(ii) the Plaintiff did not freely consent as alleged in relation to the execution of the Undertaking by the Plaintiff;

(iii) the 1st Defendant based its claim in the Suit 1869 on false premise or the claim itself is false; and there is no nexus between the Plaintiff and the outstanding sum claimed.

**[73]** With respect, the above issues are issues which have been litigated until the Federal Court.

**[74]** In any event, given that the conduct of the plaintiff in asking for the first defendant's indulgences and more time to settle the outstanding amount due to the first defendant after the demand was made by the first defendant, these arguments fall like a deck of cards.

**[75]** The plaintiff also alleged in para 17(b) of the statement of claim that it was defrauding on the part of the first defendant to express the belief that the plaintiff had no defence to the first defendant's claim. With respect, this phrase is commonly used by applicants to summary judgment. The words of O 14 r 2(1) of the Rules of the High Court 1980 is clear on that it provides:

> An application under rule 1 must be made by summons supported by an affidavit in Form 18 verifying the facts on which the claim, or the part, of a claim, to which the application relates is based *and stating that in the deponent's belief there is no defence to that claim* or part, as the case may be, or no defence except as to the amount of any damages claimed.

**[76]** These commonly used phrases, as provided by the Rules, which was used by the first defendant in obtaining summary judgment against the plaintiff, certainly cannot amount to defrauding the court. In any event the court would have been appraised of the facts of the case via the affidavits by the parties which have been filed in relation to the application for the summary judgment. The mere citing of the phrase that in the first defendant's belief that the plaintiff has no defence to the claim, cannot amount to defrauding the court. Surely the court is much more intelligent than to be fooled by the mere citing of the said phrase. How desperate can the plaintiff be to allege that this tantamount to defrauding the court.

**[77]** The plaintiff also alleges that the first defendant had put up an 'active and malicious resistance' to the plaintiff's efforts to adduce fresh evidence (the suppressed evidence) in the Court of Appeal. It is the duty of the first defendant to defend its case within the limitation of the law. If there is to be any objection by the first defendant to the application by the plaintiff in the Court of Appeal, that is the legitimate right of the first defendant to do so. After listening to the submissions of the plaintiff and the first defendant, the Court of Appeal found

in favour of the first defendant's by dismissing the notice of motion of the plaintiff in attempting to adduce fresh evidence. Where is the facts that shows that the Court of Appeal was defrauded into delivering such decision just because it was against the plaintiff.

**[78]** As for the particulars of fraud in para 17(d) and (e) of the plaintiff's statement of claim, the plaintiff complained that the first defendant purportedly kept the court and the plaintiff in ignorance of the real facts or that the first defendant had 'actively concealed and kept' the 'Suppressed Evidence' away from the court. This statement is without merits for the following reasons:

(a) it was the first defendant's solicitors who had served the bundle of documents (the alleged suppressed evidence) on the plaintiff's counsel on 17 October 2008, before the full hearing date of Suit 1869;

(b) the plaintiff's counsel had informed the court that the plaintiff would be filing an application for the discovery of documents subsequently. However such application was only made one year after the service of the bundle of documents by the first defendant's counsel on the plaintiff's counsel;

(c) two years after the service of the supplementary bundle of documents on the plaintiff's counsel, the plaintiff filed a notice of motion for leave in the Court of Appeal to adduce fresh evidence in the appeal for the summary judgment. This was subsequently dismissed by the Court of Appeal;

(d) upon appeal by the plaintiff to the Federal Court against the decision of the Court of Appeal. The Federal Court of Appeal dismissed the plaintiff's motion for leave to appeal to the Federal Court; and

(e) it was after the Federal Court's decision and after the demand for the judgment sum was made that the plaintiff now claims that the supplementary bundle of documents were being suppressed by the first defendant.

**[79]** Now, where are the facts that show that the first defendant purportedly kept the court and the plaintiff in ignorance of the real facts or that the first defendant had 'actively concealed and kept' the 'Suppressed Evidence' away from the court.

**[80]** It is to be noted that the plaintiff did not appeal on the decision of the Court of Appeal which had dismissed the motion to adduce fresh evidence (which is the alleged 'Suppressed Evidence') to the Federal Court. Instead the plaintiff now claims against the defendants in a separate civil suit ie the suit herein.

**[81]** Clearly from the above, the defendants cannot be blamed for any suppression of evidence from the courts and the plaintiff. The 'Suppressed Evidence' was made known and available as early as in the High Court and subsequently in the Court of Appeal for the Court of Appeal's consideration. The Court of Appeal subsequently decided to dismiss the plaintiff's motion for leave to adduce fresh evidence.

**[82]** The above facts do not support the allegation that there was willful concealment or suppression of evidence. The 'Suppressed Evidence' was brought before the Court of Appeal before the appeal on the summary judgment was heard. Thus, the 'Suppressed Evidence' was never suppressed at all.

*Whether the plaintiff satisfies that he has a reasonable prospect of success and produced evidence of facts discovered since the judgment complained off*

**[83]** The claim by the first defendant against the plaintiff in the Suit 1869 was premised on the undertaking by the plaintiff that he will be liable for any indebtedness by Proasas and Dynaboost.

**[84]** For the sake of repetition, after the default by the two companies, the first defendant made demands against the plaintiff. The plaintiff in turn asked for indigencies and extension of time to pay whatever amount that was outstanding to the first defendant. Never once at that point in time did the plaintiff raised the issue that the undertaking was not signed by him not that the same was signed under threat, duress and coercion.

**[85]** It is to be noted that the plaintiff was no illiterate individual but a corporate man who held high office in companies and were directors of public listed companies. He would have access to the best legal advice one can afford.

**[86]** In any event there was no police report lodged against the first defendant nor the solicitors who witnessed the plaintiff signing the undertaking, if one is to believe that he was under threat and duress or was forced to sign the undertaking. The facts shown do not support the allegation of fraud and deceit by the defendants. In the Court of Appeal case of *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283 Gopal Sri Ram JCA had occasion to deal with a litigant who alleged an act of bribery, against his opponent:

> The appellant did not lodge a contemporaneous police report complaining about the demand for a bribe The failure of the appellant to lodge a contemporaneous police report led the learned Judge to make the following remark which appears in the note of the proceedings recorded by him:

> The fact that you are prepared to lodge a report only after I have pointed it out to you that it should have been done immediately, will go to show that the tale that your client has told is far fetched. If it is true, he would have reported it to the police at once without paying the bribe …
>
> We entirely agree with the approach of the learned judge to the weight to be given to the failure of the appellant to timeously lodge a report with the police. Further, an examination of the conduct of the appellant after the commencement of the litigation, his failure to raise this matter at the earliest opportunity in his first affidavit, and producing it, as a conjurer does, like a rabbit out of a hat, leaves us in no doubt, as it did the learned judge, that the tale was an afterthought, the machinations of a desperate litigant trying every trick in the book to escape judgment being entered against him.

**[87]** Further, the alleged 'Suppressed Evidence' was not discovered since the judgment complained off was entered. These 'Suppressed Evidence' was within the knowledge of the plaintiff as early as 17 October 2008 when the supplementary bundle of documents were served on the plaintiff's solicitors by the first defendant's solicitors. The judgment complained off by the plaintiff was reinstated by the Court of Appeal on 7 July 2010. The plaintiff failed to prove that the 'Suppressed Evidence' was discovered after the judgment complained off.

**[88]** Another point which was highlighted by the first defendant in its submission with regards to the alleged 'Suppressed Evidence' is that one of the documents consists of a letter from the first defendant to the plaintiff himself (para 8(f) of the plaintiff's statement of claim). This document is within the knowledge of the plaintiff, so how could that document be categorised as 'Suppressed Evidence'.

**[89]** Hence, a careful study of the facts herein does not show that the plaintiff will have a reasonable prospect of success in his claim against the defendants in the suit herein.

**[90]** Therefore, there is no proof that the judgment complained off was obtained by fraud or deceit.

*Whether there was abuse of process by the first defendant in instituting the Suit 1869*

**[91]** The plaintiff claims that the first defendant in conniving with Dato' Ramli and the third defendant have brought the Suit 1869 for a collateral

and/or ulterior purpose of bringing improper pressure upon him to make him answerable for the amounts incurred by Proasas and Dynaboost upon 'false premise' or 'misrepresentation'.

**[92]** The Court of Appeal in the case of *Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed* [1998] 2 MLJ 425 had occasion to illustrate what is meant by 'abuse of process' at p 543:

> Every person who is aggrieved by some wrong he considers done him is at liberty to invoke the process of the court. Equally may a litigant invoke the process to enforce some claim which he perceives he has against another. When, however, the process of the court is invoked, not for the genuine purpose of obtaining the relief claimed, but for a collateral purpose, for example, to oppress the defendant, it becomes an abuse of process …

**[93]** The so called collateral purpose which the plaintiff claims that the defendants have in bringing this claim was to exert pressure upon him to pay for the amount due which was owing by Proasas and Dynaboost.

**[94]** However, this assertion is negated by the conduct of the plaintiff himself when he did not dispute the claim by the fist defendant which was premised on the unconditional and irrevocable letter of acknowledgment and undertaking to be responsible for the debts of Proasas and Dynaboost. If it was true that the first defendant with the connivance of the second and the third defendants were exerting pressure on the plaintiff surely he would have disputed the claim after receiving the first letter of demand from the first defendant and renounced the undertaking.

**[95]** Hence the allegation of abuse of process when the first defendant instituted the Suit 1869 against the plaintiff is without merit. In fact, I am of the view that it is the reverse ie it would have been an abuse of process to allow the plaintiff's claim here to proceed as whatever issue that he wished to raise herein have been raised at the earlier Suit 1869.

CONSPIRACY TO INJURE

**[96]** The plaintiff alleges at para 22 of his statement of claim that there 'has been and continues to be a conspiracy' and course of conduct purportedly 'orchestrated' by the first defendant with the participation and/or knowledge of Dato' Ramli and the third defendant or any of them as well as such other persons as may be subsequently identified in purported bad faith, using lawful and/or unlawful means and acts with the purported purpose/predominant purpose of causing injury, loss and damage to him.

**[97]** These are general allegations of conspiracy in the statement of claim. The plaintiff failed to plead particulars showing:

(a) that there was an agreement between two or more persons;

(b) the agreement was for the purpose of injuring the plaintiff;and

(c) the acts done in execution of the agreement which resulted in injuring the plaintiff.

(Refer to the case of *Yap JH v Tan Sri Loh Boon Siew & Ors* [1991] 3 CLJ 2960 where Mohamed Pzaiddin J'cited the House of Lord's decision in *Lornho Ltd v Shell Petroleum Co Ltd* [1981] 2 All ER 456 which was subsequently reaffirmed by the Court of Appeal in *Renault SA v Inokom Corporation Sdn Bhd & Anor & Other Appeals* [2010] 5 MLJ 394).

**[98]** The aforesaid are material facts which must be pleaded by the plaintiff.

**[99]** It is a known fact that Dato' Ramli ceased to be an executive/director of the first defendant from 24 August 2009 and was no longer a director of the first defendant since then. The third defendant was a dealer of the first defendant from 1 June 1991 until 25 February 2003. After that date the third defendant ceased, to be an employee of the first defendant.

**[100]** The plaintiff complained that when the plaintiff filed his motion in the Court of Appeal for leave to adduce the 'Suppressed Evidence'. It was *actively* and *maliciously* resisted by the first defendant with, the connivance of the second and the third defendants. This allegation is clearly baseless as by the time the notice of motion was filed in the Court of Appeal on 21 June 2010, Dato' Ramli and the third defendant were no longer director nor employee of the first defendant. How could they 'connive' to 'actively' tend 'maliciously' resisted the said notice of motion to adduce fresh evidence in the Court of Appeal.

**[101]** Further, nowhere in the statement of claim did the plaintiff plead of any agreement between the first defendant and Dato' Ramli and/or the third defendant to injure him. No factual averments of any overt acts purportedly done by the three defendants in execution of the agreement.

**[102]** In essence there is no particularisation as to the purported conspiracy pleaded ie:

(a) when was the agreement, between the three defendants hatched bearing in mind that Dato' Ramli and the third defendant ceased to be with the first defendant at the time when the suppressed evidence was made known to the plaintiff;

(b) what was the agreement and what was the intention of the agreement;

(c) what were the purported overt acts of the defendants in pursuance of the agreement; and

(d) how does the overt acts affected the plaintiff and resulted in injury to the plaintiff.

**[103]** The principle of pleading conspiracy has been explained in Bullen and Leake & Jacobs, in 'Precedents of Pleadings' (13th Ed), at p 221 which states:

> Pleadings. The gist of the tort of conspiracy is not the conspirations! agreement to injure alone, but that agreement plus the over acts causing damage (*Marrinan v Vibart* [1963] 1 Q.B. 234, *affirmed* [1963] 1 Q.B. 528). The statement of claim should describe who the several parties to the conspiracy are and their relationship with each other. It should allege the conspiracy between the" defendants giving the best particulars it can of the dates when or dates between which the unlawful conspiracy was entered into or continued, and the intent to injure … there is no call for a general plea of 'acting wrongly and maliciously' (*Sorrell v Smith* [1925] A.C. 700, at 714) norjis that sufficient. It should state precisely the objects and means of the alleged conspiracy to injure and the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance of the conspiracy, and lastly, the injury and damage occasioned to the plaintiff thereby.

**[104]** Compare to the bare allegation of conspiracy by the plaintiff herein with the statement of claim as in *Yap JH v Tan Sri Loh Boon Siew & Ors* [1991] 3 CLJ 2960 which appears in the judgment of Mohd Dzaiddin J which states as follows:

> In the light of the law stated above, it is convenient for me to consider first the material paragraphs in the statement of claim alleging conspiracy. They are stated thus:
>
> 12. On or about 25 February 1987 the first, second, third, fourth, fifth, sixth and the seventh defendants wrongfully and maliciously conspired and combined amongst themselves to have the plaintiff arrested on suspicion of having murdered the said Loh Kah Kheng, deceased.
>
> 13. In pursuance and in furtherance of the said conspiracy, the aforesaid defendants did the following overt acts, namely:
>
> (a) tampered with the conditions and the circumstances in which the corpse of the said Loh Kah Kheng, deceased was in insitu.
>
> Particulars
>
> (i) rearranging and/or tempering with the wires were tied to the neck, hands and body of the said Loh Kah Kheng, deceased;
>
> (ii) rearranging the position of the body of the said deceased;
>
> (iii) rearranging and/or substituting the apparel of the said deceased;

(iv) lodging a police report on the name of the second defendant which led to the arrest of the plaintiff;

(v) failing to immediately inform the police of the discovery of the corpse of the said deceased;

(vi) failing to carry out the measures or procedures of investigation required by the circumstances;

(vii) arresting the plaintiff and detaining him for two weeks in a police lock up; and

(viii) offering RM500,000 reward for information leading to the arrest and conviction of the murderer of the said deceased.

14. Each of the acts specified in the preceding paragraphs hereof was done by the person or persons therein alleged on behalf of himself or themselves and his or her or their co-conspirators un furtherance of the said conspiracy.

By reason of the matter aforesaid, the plaintiff was wrongfully arrested and imprisoned, and has been greatly injured in his credit and reputation, and has been put to considerable pain, trouble, inconvenience and expense and has suffered loss and damage.

It would appear to me that para 12 alleges the agreement between the first, second, third, fourth, fifth, sixth and seventh defendants in pursuance and in furtherance of the alleged conspiracy. In fact, this paragraph alleges a concerted action taken by the defendants. Para 14 repeats para 13. Finally para 15 pleads the essential ingredient that the alleged acts resulted in loss and damage to the plaintiff. Based on these paragraphs, in my opinion, the plaintiff's statement of claim contain the necessary and essential elements of the tort of conspiracy and the onus remains on the plaintiff to prove conspiracy and damage arising thereof.

**[105]** Therefore, the failure of the plaintiff to plead any agreement nor the particulars of the agreement, and failure to plead with clarity of the alleged overt acts of each of the defendants in committing the alleged conspiracy in pursuance of their agreement proves fatal to the said allegation.

**[106]** The lack of particulars in the statement of claim in the suit herein, as to the tort of conspiracy may prove difficult for the defendants to answer to the charge. The plaintiff thus failed to plead material facts necessary to disclose a reasonable cause of action against the defendants.

**[107]** Therefore, the bare allegation of conspiracy of the three defendants is a frivolous and vexatious one.

## THE PRINCIPLES OF STRIKING OUT

**[108]** It is trite that the court will only strike out a claim in a plain and obvious case or that the claim is obviously unsustainable (refer to *Bandar*

*Builder Sdn Bhd & Ors v United Malayan Banking Corporation Berhad* [1993] 3 MLJ 36 where the court held at p 43 that:

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the Rules of the High Court 1980 are well settled. If is only in plain and obvious cases that recourse should be had to the summary process under this rule … and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' …

**[109]** Gopal Sri Ram JCA (as he then was) in the case of *Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (Formerly known as Lipkland (Sabah) Sdn Bhd) & Ors* [1969] 1 MLJ 309 explained the proper approach when dealing with an application under O 18 r 19(1) of the Rules of the High Court 1980:

> Whether a case is plain and obvious does not depend upon the length of time it takes to argue the case, but that when the case is argued on the affidavit evidence available, it becomes plain and obvious that the case has no chance of success …
>
> When the question of law becomes an issue, this in itself will not prevent the court from granting the application, for as long as the court is satisfied that the issue of law is unarguable and unsustainable, it may proceed to determine that question (see *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400). Likewise, where the affidavit evidence disposes a dispute of facts, such facts must be analysed and if they are found to be inconsistent with undisputed contemporary documents or inherently improbable in themselves, the court is entitled to reject those facts and proceed upon the undisputed contemporaneous documentary evidence.

**[110]** Applying the principles as set out in the cases above with regards to the principles in striking out, upon analysis from the affidavit evidence, it is clear that the serious allegations made by the plaintiff against the defendants with regards to fraud, deceit, conspiracy, connivance in the statement of claim as compared to the evidence adduced herein ie:

(a) the letters from the plaintiff which sought for indulgences from the first defendant for an extension of time to pay the debts of the two companies after demand was made by the first defendant;

(b) the service of the supplementary bundles of documents on 17 October 2008 on the plaintiff's solicitors;

(c) the arguments in the Court of Appeal with regards to the alleged 'Suppressed Evidence' when the plaintiff filed his application in the notice of motion to adduce fresh evidence, which was dismissed by the Court of Appeal unanimously;

(d) the application by the plaintiff for leave to appeal to the Federal Court on

the decision of the Court of Appeal which had reinstated the decision of the SAR in the High Court (which granted the first defendant's application for summary judgment against the plaintiff) which was dismissed by the Federal Court;

(e) the failure of the plaintiff to appeal on the decision of the Court of Appeal that dismissed the plaintiff's notice of motion to adduce fresh evidence at the appeal in the Court of Appeal;

(f) the failure of the plaintiff to lodge a police report on the alleged deceit and fraud committed by the defendants in executing the undertaking;

(g) no actual fraud shown; and

(h) no particulars of conspiracy pleaded,

clearly shows that the claim by the plaintiff against the defendants are unsustainable and not likely to succeed.

**[111]** In any event the plaintiff has already had his day in court where all the issues raised herein have been ventilated and adjudicated to its finality until the Federal Court. To allow the claim would be an abuse of process as the claim is clearly frivolous and vexatious.

**[112]** The plaintiff should honour his undertaking dated 28 June 1999 which he had signed and executed in favour of the first defendant instead of vexing the defendants for the second time in the sit herein.

**[113]** Therefore:

(a) the application by the first defendant in encl 7 is allowed with costs; and

(b) the application by the second defendant in encl 11 is allowed with costs.

*Defendants' application allowed with costs.*

Reported by Ashgar Ali Ali Mohamed